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No. 99-606

IN THE
Supreme Court of the United States

B. WILLIS, CPA, INC.; and BUCK WILLIS,

Petitioners,

v.

JAMES D. GOODPASTER, sued as: The Honorable James D. Goodpaster; PUBLIC SERVICE COMPANY OF OKLAHOMA; JOHN DOE, sued as: John Doe 1-100,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Background Facts

Respondent Public Service Company of Oklahoma ("PSO") is an Oklahoma public utility which provides electricity to its customers. By virtue of Okla. Stat. tit. 27, § 7 and Okla. Stat. tit. 66, §§ 51-60, PSO is authorized to acquire real property by condemnation.

PSO found it necessary to acquire an easement to build a railroad spur for transporting coal to one of its power plants. A portion of the easement needed by PSO crosses a portion of property owned by Petitioner B. Willis, C.P.A., Inc. ("Willis"). Having failed to acquire the necessary easement from Willis by private purchase, in October 1992 PSO commenced an eminent domain proceeding in state court.[1]

As the Court of Appeals noted in a previous decision in a related appeal from which Willis has also sought certiorari review,[2] the procedure under Oklahoma law to take real property by condemnation may be outlined in five steps:

(1) The state district court, with notice to the landowner, selects a three person commission;

(2) the commissioners inspect the property, and file a report with the clerk of the court setting forth the value of the property to be taken;

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1. *Public Service Company of Oklahoma v. B. Willis, C.P.A., Inc.*, Case No. C-92-507, Rogers County, Oklahoma District Court (hereinafter referred to as the "State Court Condemnation Action").

2. *See B. Willis, C.P.A., Inc. v. Public Service Company of Oklahoma, et al*, 1999 WL 33507, *cert. filed* August 12, 1999 (U.S. Supreme Court No. 99-256).

(3) the condemnor may then pay the assessed sum into court, and take immediate possession of the property consistent with its proposed use;

(4) the landowner may file with the court written exceptions to the report objecting to the public use or necessity of the taking or the value assessed; and

(5) the state district court's judgment on the public use or necessity issues or the compensation issue may be appealed.

1999 WL 335207 at 1. As the Court of Appeals further noted, Oklahoma case law has also established that the landowner has the option to seek an injunction from the state district court to enjoin the condemnor from taking possession prior to the adjudication of the public use question. *Id.* at 3.

In the State Court Condemnation Action, commissioners were appointed by the district court. The commissioners filed their report, setting the total compensation for the taking of Willis's property at $49,920. PSO promptly paid this amount to the court clerk, therefore giving it the right under Oklahoma law to take immediate possession of Willis's property consistent with its proposed use. *See* Okla. Stat. tit. 66, § 53(C).

Willis filed written exceptions to the commissioners' report, contending that the taking was not necessary and was not for a public use, and that the amount of compensation set by the commissioners was inadequate. At no time between the date the commissioners filed their report and the date the state district court ruled on Willis's exceptions did Willis seek an injunction to enjoin PSO from taking possession of

Willis's property after PSO paid the commissioners' award into court.

In March 1994 the state district court ruled in favor of PSO on Willis's claim that the taking was not necessary or for a public purpose. In doing so, the state district court held that the filing of the condemnation petition shifted the burden to Willis to present evidence to vitiate the taking, and rejected Willis's argument that PSO was required to introduce into evidence a resolution of necessity. Willis appealed this ruling.[3] Willis's appeal was limited to whether he was given a proper hearing and whether he was entitled to certain discovery. [4]

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3. Oklahoma Supreme Court Appeal No. 83,358.

4. Willis falsely asserts that in this appeal the Oklahoma Supreme Court ultimately determined that PSO wrongly took possession of Willis's property. PSO's possession of Willis's property had not been accomplished at the time of the state district court's ruling in March 1994, and was not an issue and was not addressed in the court's March 1994 judgment. Nor was the possession issue raised by Willis in the appeal. In its published opinion, *see infra* n.7, the Oklahoma Supreme Court did not address whether PSO's possession was lawful under Okla. Stat. tit. 66, § 53(C). As a full reading of the opinion makes clear, the constitutional and statutory violation found by the Oklahoma Supreme Court concerned Willis's failure to have a meaningful opportunity to be heard as a result of the state district court's ruling on the discovery and burden of proof issues, the two issues appealed.

In several state court proceedings following the Oklahoma Supreme Court's opinion, including at least three in the Oklahoma Supreme Court itself, Willis has made the same false assertion concerning the scope of the opinion. No court has agreed with Willis's fanciful interpretation of the opinion.

During the pendency of the state court appeal, Willis sought interim equitable relief from the Oklahoma Supreme Court prohibiting PSO from constructing the rail spur over Willis's property. Aplee. Supp. App. at 118.[5] Willis argued, among other things, that PSO's proposed taking was not for a public use or reasonably necessary. *Id.* After an adversary hearing, the Oklahoma Supreme Court denied Willis's request for an immediate stay. *Id.* at 122. After a further hearing, the Oklahoma Supreme Court denied Willis any equitable relief, with all justices concurring. *Id.* at 123.

While the state court appeal was pending, in March 1995 PSO completed the railroad spur and began transporting coal over it. When Willis threatened to interfere with the use of the railroad by PSO (and PSO's contract rail carrier), in April 1995 PSO obtained an injunction from the state district court prohibiting Willis from interfering, directly or indirectly, with the use of the railroad spur (the "April 1995 Injunction"). In issuing the injunction, the state district court specifically held that PSO had a right to possession and use of Willis's property under Okla. Stat. tit. 66, § 53(C). Although under Oklahoma law Willis had a right to immediately appeal the entry of the injunction, including the state district court's interpretation of § 53(C), *see* Okla. Stat. tit. 12, § 993, Willis did not exercise this right.

In Willis's state court appeal, the Oklahoma Court of Civil Appeals reversed in part and affirmed in part the state district court's ruling. Relying upon *McCrady v. Western Farmers Electric Cooperative*, 323 P.2d 356 (Okla. 1958), the Court of Civil Appeals agreed with the district court that PSO was not required to file a copy of the resolution of

5. References to "Aplee. Supp. App." are to the record submitted to the Court of Appeals.

necessity with its petition, and held that the simple act of filing the petition which alleges necessity for the taking raises a rebuttable presumption that the condemnation is necessary, shifting the burden to the landowner to rebut the presumption. Pet. App. E at 31a-32a.[6] However, the Court of Civil Appeals held Willis was entitled to certain discovery prior to the hearing, and therefore reversed the judgment for a new hearing following such discovery.

Subsequently, on certiorari review, the Oklahoma Supreme Court vacated the Court of Civil Appeals' opinion and reversed the state district court's judgment in its entirety. In a published opinion, the Oklahoma Supreme Court held the Court of Civil Appeals and the state district court erred in their burden of proof analysis, and further erred in denying Willis certain discovery materials.[7] The Oklahoma Supreme Court remanded the case for a new hearing on the public use and necessity issues consistent with its opinion.

Before a new hearing could be held in the state district court, Willis filed a motion to vacate the April 1995 Injunction and to dismiss the condemnation proceeding based, in part, on the contention it makes here that the Oklahoma Supreme Court's *PSO v. Willis* opinion determined PSO was wrongly in possession of Willis's property. The state district court disagreed with Willis's position and denied Willis's motion. Willis appealed the

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6. References to "Pet. App." are to the appendix of Petitioners' Brief.

7. *Public Service Company of Oklahoma v. B. Willis, C.P.A., Inc.*, 941 P.2d 995 (Okla. 1997) (Pet. App. E at 27a) (hereinafter "*PSO v. Willis*").

denial of its motion.[8] The Oklahoma Court of Civil Appeals affirmed the district court's judgment. Pet. App. F at 38a. After holding that under Oklahoma law "granting injunctive relief in aid of *a party properly upon the condemned premises, to bar interference with its operations there*, is not totally unrelated to the issues before the court in a condemnation case," *id.* at 46a-47a (emphasis added), the court rejected Willis's interpretation of the Oklahoma Supreme Court's opinion in *PSO v. Willis*:

> [Willis's] other arguments are colored by his contention that the Supreme Court's opinion on his first appeal constituted "settled law of the case," which necessarily required dismissal of PSO's claim for injunctive relief made in its second petition. We do not agree. . . . *The first appeal resolved only [Willis's] right to an evidentiary hearing, and the question whether PSO established a prima facia case of necessity by alleging necessity in its original petition.* Neither of those issues finally determined the propriety of the trial court's subsequent entry of an order granting injunctive relief, and the question could not even have been timely raised during the pendency of the first appeal, because it was not at issue when the first appeal was commenced.

Id. at 47a-48a (emphasis added). Thus, contrary to Willis's assertions here, the Oklahoma Court of Civil Appeals recognized that the state district court's ruling that PSO had a right to possession and use of Willis's property in

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8. Oklahoma Supreme Court appeal No. 90,569.

accordance with Okla. Stat. tit. 66, § 53(C), which led to entry of the April 1995 Injunction, was not addressed by the *PSO v. Willis* opinion, nor could it have been because the issue was not even before the Oklahoma Supreme Court in that appeal. The Oklahoma Supreme Court denied Willis's petition for writ of certiorari to review the Court of Civil Appeals' decision. Mandate has issued, and the case is once again before the state district court for an evidentiary hearing on the right to take issue.[9]

In addition to having its interpretation of the scope of the *PSO v. Willis* opinion rejected by the district court and the Oklahoma Court of Civil Appeals, Willis's interpretation of the *PSO v. Willis* opinion has been rejected multiple times by the Oklahoma Supreme Court. In September 1997 Willis filed an application to assume original jurisdiction and sought a writ of prohibition from the Oklahoma Supreme Court. Aplee. Supp. App. at 256. In this proceeding Willis argued that, as a result of the *PSO v. Willis* opinion, "it is now the settled law of the case that PSO's appropriation of Willis's property prior to an evidentiary hearing on PSO's right to take is a violation of Willis's constitutional and statutory rights." *Id.* at 258. Willis cited the very same portions of the *PSO v. Willis* opinion it cites here. *Id.* Following a hearing on Willis's application, the Oklahoma Supreme Court denied the application with all justices concurring. *Id.* at 268.

In November 1997 Willis once again filed an application to assume original jurisdiction and sought a writ of mandamus from the Oklahoma Supreme Court. Aplee. Supp. App. at 279. Willis again made the very same argument

9. The state district court has set a status conference for November 22, 1999, at which time it is expected the court will issue a scheduling order and set a date for the evidentiary hearing.

which forms the basis for his Petition here: that the state district court was failing to follow the mandate of the Oklahoma Supreme Court. In its application to the Oklahoma Supreme Court Willis stated:

> the opinion of the [Oklahoma] Supreme Court clearly holds that PSO's possession of Willis's property before Willis has a meaningful hearing violates Willis's constitutional and statutory rights. As a result, it automatically follows that PSO's continued possession of the property prior to Willis having a meaningful hearing is a continuing violation of Willis's constitutional and statutory rights.

Id. 286. Willis further argued that the state district court was violating the mandate of the Oklahoma Supreme Court by permitting a contempt of court proceeding to be filed against Willis. *Id.*[10] Following a hearing, on December 18, 1997 the Oklahoma Supreme Court entered an order rejecting Willis's arguments, with all justices concurring. *Id.* at 298.[11]

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10. Indeed, Willis's arguments in the state appellate proceedings are virtually identical to those made in the Petition filed in this Court. Willis has simply changed "state district court" in the state proceedings to "Court of Appeals" in its Petition to this Court.

11. Willis also attempted to disqualify the district judge in the State Court Condemnation Action, Judge Goodpaster, based on unsubstantiated allegations by Willis that Judge Goodpaster's orders were based on subversion of the judicial system by PSO. Willis alludes to such unsubstantiated allegations in the Petition. *E.g.*, Pet. at 4, 23-24. Neither the presiding judge of the judicial district nor the Oklahoma Supreme Court, after holding hearings, required disqualification of Judge Goodpaster, despite Willis's (Cont'd)

B. Course of Proceedings and Disposition Below.

On December 9, 1997, Willis filed this action in federal district court. Even though by this time the state district court and the Oklahoma Supreme Court had rejected Willis's interpretation of the *PSO v. Willis* opinion, Willis continued to assert, among other things, that as a result of that opinion (1) PSO was violating Willis's federally protected right to equal protection of the law, (2) PSO was being unjustly enriched, and (3) PSO and Judge Goodpaster were violating Willis's federally protected right to freedom of speech. PSO (and Judge Goodpaster, through real party in interest PSO) filed a motion to dismiss the action. The District Court granted PSO's motion to dismiss.

On appeal, the Court of Appeals affirmed the District Court's dismissal. With respect to Willis's free speech claim, the Court of Appeals relied on *United States v. O'Brien*, 391 U.S. 367 (1968), and held that Willis failed to state a claim for violation of its free speech rights. The Court of Appeals affirmed the dismissal of Willis's remaining claims for substantially the same reasons stated by the District Court in its order.

(Cont'd)
application to both to have Judge Goodpaster disqualified. At these hearings Willis never provided any evidence to support its serious allegations. Indeed, Willis's claim that the proceedings before Judge Goodpaster in 1994 were corruptly subverted is belied by the fact that Willis made no attempt to seek Judge Goodpaster's disqualification until more than three years after the alleged subversion. Willis then attempted to use the fact it named Judge Goodpaster in this lawsuit as a basis for having Judge Goodpaster disqualified. Willis's motive for naming Judge Goodpaster as a defendant, indeed Willis's entire claim of judicial subversion, is transparent on its face.

C. The Petition for a Writ of Certiorari.

Willis requests this Court grant certiorari to review the opinion of the Court of Appeals on but a single proposition: "Is the decision of the Court of Appeals based on a refusal to follow state law as pronounced by the Oklahoma Supreme Court?" Willis contends the Court of Appeals, in dismissing Willis's equal protection, unjust enrichment, and free speech claims, "blatantly" misstated Oklahoma eminent domain law. As Willis makes clear in the opening paragraph of the Statement of Case in its Petition, the basis of Willis's action

> is the acts of [PSO] in continuing to appropriate the use of the property of [Willis] under color of state law prior to a hearing and judicial determination of the public nature of such use in violation of Willis's constitutional and statutory rights after the decision of the Oklahoma Supreme Court to that effect.

The "decision of the Oklahoma Supreme Court" referred to by Willis is the *PSO v. Willis* opinion. Indeed, Willis's entire argument is based on its position that the Oklahoma Supreme Court determined in *PSO v. Willis* that PSO is presently in possession of Willis's property in violation of Oklahoma eminent domain law.

No court, including the Oklahoma appellate courts on multiple occasions, has agreed with Willis's interpretation of the *PSO v. Willis* opinion. Because Willis's entire argument is premised on its faulty interpretation of the *PSO v. Willis* opinion, its argument in support of certiorari review has no merit.

Accordingly, Willis's petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

In its Complaint filed in the District Court, Willis asserted PSO violated Willis's right to equal protection of the law, violated Willis's right to freedom of speech, and was unjustly enriched at the expense of Willis by continuing to appropriate the use of Willis's property after the Oklahoma Supreme Court's opinion in *PSO v. Willis*. In its Petition, Willis asserts the dismissal of these claims by the District Court, and the Court of Appeals' affirmance of that dismissal, was based upon a "blatant misstatement of Oklahoma eminent domain law." To support this assertion, Willis states:

> The basis of this action is the acts of Public Service Company of Oklahoma ("PSO") in continuing to appropriate the use of the property of Petitioner, B. Willis, C.P.A., Inc. ("Willis") under color of state law prior to a hearing and judicial determination of the public nature of such use in violation of Willis' constitutional and statutory rights *after the decision of the Oklahoma Supreme Court to that effect*.

Pet. at 3 (emphasis added) (referring to the *PSO v. Willis* opinion).

The question presented by Willis is not one which this Court should consider on certiorari. Moreover, Willis misstates the scope of the Oklahoma Supreme Court's holding in *PSO v. Willis*, and misstates Oklahoma eminent domain law. The Court of Appeals properly interpreted *PSO v. Willis*, and applied Oklahoma eminent domain law consistent with Oklahoma constitutional, statutory, and decisional law. There is no basis for this Court to exercise its discretion to grant certiorari and review the Court of Appeals' opinion.

A. Willis has failed to identify any consideration under Sup. Ct. R. 10 for this Court to grant certiorari review.

Willis's argument that the Court of Appeals erred in dismissing its claims is not based on the Court of Appeals' resolution of the federal questions involved, but rather is based on Willis's contention that the Court of Appeals misapplied state law. Certiorari review by this Court would necessarily involve interpreting Oklahoma law, namely interpreting the Oklahoma Supreme Court's decision in *PSO v. Willis*.

Such a quest for certiorari review is clearly outside the ambit of Rule 10 considerations governing review on certiorari. This Court should not exercise its judicial discretion to review a decision of the Court of Appeals when the sole argument in favor of review is that the Court of Appeals misapplied a state court decision on a state law issue.

It is important to note that, with respect to Willis's free speech claim, the Court of Appeals' decision was based on this Court's holdings in *United States v. O'Brien*, 391 U.S. 367 (1968), and *Healy v. James*, 408 U.S. 169 (1972), as well as decisions from other circuit courts of appeals. Willis does not contend the Court of Appeals' decision in this case conflicts with these cases. Willis merely asserts the Court of Appeals misapplied the rule of law established by *O'Brien* and the other cited cases because the Court of Appeals misinterpreted a state court decision. As this Court plainly states in Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Willis fails to set forth any compelling consideration for this Court to grant certiorari and review the decision of the Court of Appeals.

B. The Court of Appeals did not "blatantly misstate" the holding of the Oklahoma Supreme Court in *PSO v. Willis*. Rather, the Court of Appeals interpreted *PSO v. Willis* in the same manner as the state courts have on multiple occasions.

The crux of the entire Petition is that the Court of Appeals failed to follow the Oklahoma Supreme Court's holding in *PSO v. Willis*. Willis contends that in *PSO v. Willis* the Oklahoma Supreme Court determined PSO is wrongly in possession of Willis's property. That issue, however, was not before the Oklahoma Supreme Court, nor did the Oklahoma Supreme Court address the issue in its decision. The history of the *PSO v. Willis* opinion, as detailed in the Background Facts, *supra* at 1-4, as well as the plain language of the opinion itself, demonstrates Willis's interpretation of the scope of the *PSO v. Willis* opinion is without basis.

Indeed, in decision after decision, the Oklahoma courts have specifically rejected Willis's arguments and have refused to interpret the *PSO v. Willis* opinion as Willis urged the Court of Appeals to do in this case. For instance, in September 1997 Willis filed an Application to Assume Original Jurisdiction and Petition for Writ of Mandamus with the Oklahoma Supreme Court in which Willis contended that, as a result of the *PSO v. Willis* opinion, "it is now the settled law of the case that PSO's appropriation of Willis' property prior to an evidentiary hearing on PSO's right to take is a violation of Willis' constitutional and statutory rights."

Aplee. Supp. App. at 258. Willis cited much of the same authority it cites in the Petition here. Following a hearing, the Oklahoma Supreme Court denied Willis's application, with all justices concurring. Aplee. Supp. App. at 268.

Willis also asserted its interpretation of the *PSO v. Willis* opinion in the state trial court. The state trial court rejected Willis's interpretation. Aplee. Supp. App. at 269-270. Willis appealed the state trial court's decision to the Oklahoma Court of Civil Appeals. The Oklahoma Court of Civil Appeals affirmed the trial court's judgment, and rejected Willis' characterization of the *PSO v. Willis* opinion. In so holding, the Oklahoma Court of Civil Appeals stated:

> [Willis'] other arguments are colored by his contention that the Supreme Court's opinion on his first appeal constituted "settled law of the case," which necessarily required dismissal of PSO's claim for injunctive relief made in its second petition. We do not agree. . . . *The first appeal resolved only [Willis'] right to an evidentiary hearing, and the question whether PSO established a prima facie case of necessity by alleging necessity in its original petition.* Neither of those issues finally determined the propriety of the trial court's subsequent entry of an order granting injunctive relief, and the question could not have even have been timely raised during the pendency of the first appeal, because it was not at issue when the first appeal was commenced.

Pet. App. F at 47a-48a (emphasis added). The Oklahoma Supreme Court denied Willis' Petition for Writ of Certiorari to review the Court of Civil Appeals' decision.

In November 1997 Willis filed a second Application to Assume Original Jurisdiction and Petition for Writ of Mandamus with the Oklahoma Supreme Court. Aplee. Supp. App. at 279. In this Application, Willis stated:

> The opinion of the Supreme Court clearly holds that PSO's possession of Willis' property before Willis has a meaningful hearing violates Willis' constitutional and statutory rights. As a result, it automatically follows that PSO's continued possession of the property prior to Willis having a meaningful hearing is a continuing violation of Willis' constitutional and statutory rights.

Id. at 286. Willis once again cited many of the same cases it cites to this Court. Once again, the Oklahoma Supreme Court, after affording Willis a hearing, rejected Willis's argument and declined to grant any relief, with all justices concurring. *Id.* at 298.

Quite simply, in the state courts Willis has made the same argument it makes here, and the state courts have rejected Willis's argument each and every time. The Court of Appeals' interpretation of the *PSO v. Willis* opinion is consistent with the interpretation given it by the state courts. Clearly, there was no "blatant misstatement" of the *PSO v. Willis* opinion by the Court of Appeals.

C. Willis's argument fails on the merits.

Because Willis spends much of the Petition arguing the merits of Oklahoma imminent domain law, as opposed to simply arguing why this Court should grant certiorari review, PSO is constrained to briefly respond on the merits. Plainly,

even beyond application of the *PSO v. Willis* opinion. Willis's claim that the Court of Appeals misapplied Oklahoma eminent domain law has no merit, as demonstrated by the three Oklahoma cases upon which Willis relies.

First, in *Watkins v. Board of Commissioners*, 174 P. 523 (Okla. 1918), the plaintiff landowners sought to enjoin the taking of their land by the defendant Board of Commissioners for the construction of a public road. A crucial fact in *Watkins* was that "no compensation had been paid to the plaintiffs *or deposited for their use. . . .*" *Id.* at 523 (emphasis added). The court, after quoting Okla. Const. Art. 2, Sec. 24, including the provision that states "[u]ntil the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, nor the proprietary rights of the owner divested," went on to hold that the defendant Board of County Commissioners had the power to appropriate land when

> the constitutional requirements as to condemnation and compensation are met, which requirements, in the absence of agreement with the landowners, contemplate notice to the landowner and ascertainment of the damages by not less than three disinterested freeholders duly appointed by a court of competent jurisdiction or the judge of such court from the regular jury list for the county in which the land is situated *and the payment of the compensation allowed to the owner, or deposit of same in court for his use,* with the right of trial by jury afterwards to any party aggrieved as to the amount of the damages.

Id. at 525.

In *Watkins*, there was nothing in the appellate record to establish the Board of County Commissioners had begun condemnation proceedings. As the court stated,

> [i]f there were any evidence or matters of which we might take judicial notice in the record before us to show that the land had been duly condemned and appraised upon notice to the owners, we might find that the rights of the plaintiffs had become adjudicated by the action of the district court in the condemnation proceedings . . . .

Id. In the absence of such proceedings, the court properly held that the plaintiffs' property was taken without due process of law.

Unlike in *Watkins*, in this case condemnation proceedings were begun; notice was given to Willis; commissioners were appointed by the state trial court; the commissioners properly filed their report setting a value for the taking; and PSO paid the amount set forth in the commissioners' report into the court for the benefit of Willis, all before PSO began constructing the portion of the rail spur which crosses Willis's property. All the statutory requirements were met before PSO took possession of Willis's property. Thus, *Watkins* is wholly distinguishable, and does not support Willis's contention that it has been denied equal protection of the laws.

Willis also relies heavily upon *Town of Ames v. Wybrant*, 220 P.2d 693 (Okla. 1950). In *Town of Ames* the landowners filed a motion to dismiss a condemnation action on the ground that the plaintiff had no right to condemn the property rights involved. When the trial court deferred consideration

of the issues until after the commissioners' report could be filed, the landowners petitioned the Oklahoma Supreme Court for a writ of prohibition. The landowners were motivated by the fear that if a ruling were deferred until after the commissioners' report was filed, the condemnor would, under Okla. Stat. tit. 66, § 53(C), pay the sum of money set by the commissioners into court as soon as the commissioners' report was filed, take possession of the premises, and begin construction of the improvements, all before a binding determination of the right to condemn could be obtained by the landowners. The Oklahoma Supreme Court refused to issue the requested writ of prohibition, finding that the landowners "as defendants in said causes pending in the district court, are, by law, afforded adequate remedies therein for the protection of their rights *when properly sought*, and we so hold." *Id.*, 220 P.2d at 696 (emphasis added). The Oklahoma Supreme Court then stated:

> In view of the stress laid in the argument upon the alleged threat of plaintiff therein to enter possession before a determination of the question of the plaintiff's right to condemn, we deem it well to say that the district court after objection to the commissioners' report or the trial judge prior thereto in a proper case and upon proper application and showing in connection with preliminary steps in condemnation *could make an order temporarily restraining the condemnor from taking possession of the land pending final determination of the right to condemn.*

Id. (emphasis added). Thus, it is clear that the landowner, if it desires to retain possession pending an adjudication of the right to take issue, must seek an injunction to enjoin possession of the premises by the condemnor.

The third case heavily relied upon by Willis, *Wrightsman v. Southwestern Natural Gas Co.*, 46 P.2d 925 (Okla. 1935), reached the same result 15 years earlier. In *Wrightsman* the court concluded its opinion with the following:

> In order that the scope of this decision may not be misunderstood, it should be stated that we are not herein holding that a trial judge could not, in a proper case and upon proper application and showing in connection with preliminary steps in a condemnation proceeding, *make an order temporarily restraining a condemnor from taking possession of the land pending final determination of the right to condemn by the court proper.*

Id. at 933 (emphasis added).

Thus, under *Town of Ames* and *Wrightsman*, a landowner who wants to have the right to condemn determined prior to losing possession must apply to the trial court for an order "temporarily restraining the condemnor from taking possession of the land pending final determination of the right to condemn." Willis never attempted to exercise this right. Instead, Willis stood idly by and took no action in the state trial court to prevent PSO from constructing the rail spur across his property until well after the railroad was completed and trains began hauling coal.

Finally, as noted earlier, in the State Court Condemnation Action the trial court, in entering the April 1995 Injunction, specifically held that PSO was entitled to use and possession of Willis's property under Okla. Stat. tit. 66, § 53(C). The state trial court's ruling is the only ruling in the State Court Condemnation Action in which PSO's

entitlement to use and possession of Willis's property under § 53(C) has been specifically adjudicated. Under Oklahoma law, Willis had 30 days from the date of the entry of the Order granting the April 1995 Injunction to appeal the trial court's ruling to the Oklahoma Supreme Court. *See* Okla. Stat. tit. 12, § 993. Willis did not do so. That ruling, therefore, constitutes the law of the case and must be followed by the federal courts. The Court of Appeals, in affirming the district court's judgment, properly followed Oklahoma law.

CONCLUSION

The question tendered by Willis for certiorari review, and the arguments proffered by Willis in support of the question presented, do not present any compelling reason for this Court to exercise its discretion to review the opinion of the Court of Appeals. Accordingly, Willis's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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